UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

In Re: RFC and RESCAP Liquidating Trust Litigation

File No. 13-cv-3451 (SRN/HB)

ResCap Liquidating Trust,

Plaintiff,

v.

Primary Residential Mortgage, Inc.

Defendant.

File No. 16-cv-4070 (SRN/HB)

Via Zoom for Government

December 18, 2020

9:00 a.m.

BEFORE:

The Hon. **SUSAN RICHARD NELSON,** United States District Judge

Official Court Reporter: Carla R. Bebault, RMR, CRR
U.S. Courthouse, Suite 146
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St. Paul, Minnesota 55101

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P R O C E E D I N G S

VIA ZOOM FOR GOVERNMENT

THE COURT: We are here this morning in the matter of ResCap Liquidating Trust versus Primary Residential Mortgage, Inc. This is civil file number 16-4070. Let's begin with appearances and we'll start with the Trust, please.

MR. NESSER: Good morning. It's Isaac Nesser at Quinn Emanuel for the plaintiffs. Nice to see you virtually.

THE COURT: Good morning. Mr. Heeman.

MR. HEEMAN: Sorry. Good morning, Your Honor. Don Heeman from Spencer Fane on behalf of the plaintiff.

THE COURT: Very good.

MS. NELSON: Good morning, Your Honor. Jessica Nelson from Spencer Fane on behalf of plaintiff.

MS. QUINN: Good morning, Your Honor. Laurie Quinn from Spencer Fane on behalf of plaintiff.

THE COURT: Very good.

MS. CHRISTENSON: I apologize, Your Honor.

THE COURT: I'm sorry. Ms. Christenson.

MS. CHRISTENSON: Good morning, Your Honor. Heather Christenson, Quinn Emanuel, on behalf of the Trust.

THE COURT: Good morning.

All right. Let's turn to the defendant PRMI, please.

MR. JOHNSON: Good morning, Your Honor. Matt Johnson, Williams & Connolly, for PRMI.

THE COURT: You know, Mr. Johnson, I'm having a little bit difficulty hearing you, so if you're going to argue today, I don't know if you can enhance that audio or not.

MR. JOHNSON: Sure. Mr. Nicholson will be handling the argument so I will be on mute.

THE COURT: Well, whatever you just did worked.

MR. JOHNSON: Okay.

THE COURT: Mr. Nicholson.

MR. NICHOLSON: Good morning, Your Honor. Matt Nicholson from Williams & Connolly for PRMI.

THE COURT: Good morning.

MS. KNIFFEN: Good morning, Your Honor. Elizabeth Kniffen from Zelle for PRMI.

THE COURT: Good morning. All right. We are here this morning to consider the Trust's motion for attorney's fees, costs and pre-judgment interest. How will we proceed with this motion? Who will be heard?

MR. NESSER: Your Honor, it's Isaac Nesser. I will be kicking things off, but Heather and I, Ms. Christenson and I, will be splitting some of the

argument this morning.

THE COURT: Very good. You may proceed, Mr. Nesser.

MR. NESSER: Thank you, Your Honor. This is my first Zoom hearing so hopefully I will be -- hopefully I will do okay.

THE COURT: I think it's probably my thousandth Zoom hearing.

MR. NESSER: I'm sure that's true. Old hat for you. Still learning as we go.

Your Honor, at trial we talked a lot about what we on the Trust side believed was a practical, common sense approach to determining PRMI's fair share of liability. We talked a lot about the way that real people in the real world make decisions. And what we heard from PRMI, as we said, were hyper-technical kind of arguments that really don't reflect real world risk assessments, and it seems as if we're right back where we were at that point in time.

Your Honor, the Trust managed this case, as it has the entire litigation campaign, carefully and responsibly as any litigant would. The Trust has a responsibility and has a fiduciary duty to its unit holders to manage the case efficiently. The Trust has recovered $1.3 billion approximately in settlements, prevailed in the *HLC* trial, prevailed in this trial. We reduced the number of

timekeepers and hours and the fees here substantially relative to what we had in *HLC*, and we did that even though the Trust had an obligation to protect the record in *HLC*, which was on appeal, pending on appeal, even while the trial in this case was proceeding; and that was the $70 million -- $70 million judgment that was still up in the air and still in play as the trial in this case was proceeding.

And, Your Honor, we did all that in the context of claims that are extraordinarily complex and difficult and expensive to litigate necessarily and against a defendant that didn't make things easy all the time.

And as against all of that, Your Honor, PRMI makes a string of arguments that from our perspective are just divorced from reality and the real world of this litigation. They say that we didn't meet our burden on the motion because we filed redacted invoices, even though the Court has already rejected that argument and rejected that argument in *HLC*, and we believe it rejected that argument again here in the order a few weeks ago.

And then PRMI says, well, there's nothing unusual or exceptional or extraordinary about this case. I mean, Your Honor, it's difficult to understand even if they were in the same courtroom with us for the last several years. There was nothing ordinary about this case. And PRMI's argument really boils down to the same contention that the

counsel made in *HLC*, which the Court rejected in the fee order in *HLC*, that this is just an ordinary, standard, two-party contract dispute. They don't say that in those words anymore because Your Honor rejected it, but that's the sum and substance of their position.

Your Honor, that kind of Monday morning quarterbacking maybe would have been less objectionable if PRMI had prevailed in the case. They didn't. And perhaps it would have been more understandable if PRMI could credibly claim surprise by the nature and size of our fee request here, but they can't because over and over again we stood up in open court and sounded the alarm bells as loudly as we can. We said PRMI was forcing the parties to conduct the litigation in a manner that was out of all proportion to the size of the case, and we explicitly said that if they made that choice, they ought not complain down the road if they were asked to make good on their agreement in the contract to pay the Trust's fees.

And so, Your Honor, that's by way of introduction how we see things. Ms. Christenson and I were among the very first lawyers to begin work on these cases at Quinn Emanuel and so it's fitting in the sense that we're now almost seven years later and it's down to the two of us and, of course, our friends at Spencer Fane. And so the way in which we plan to split today's argument is that

Ms. Christenson will explain why a case like this would have been extraordinarily expensive to litigate even in the best of circumstances, and then talk about the efficiencies that we were able to achieve nonetheless.

And then I'll just address some of the specific drivers of our increased fees, including issues of proportionality. We had planned to rest on our papers with respect to the issue of pre-judgment interest unless the Court has any particular questions about that issue.

With that, I'll turn it over to Ms. Christenson with the Court's permission.

THE COURT: Thank you, Mr. Nesser.

Ms. Christenson.

MS. CHRISTENSON: Good morning, Your Honor. This is Heather Christenson. As we proceed, I will begin by addressing the expenses in this case. (Indiscernible) and the other ResCap cases require a type of litigation that this Court has recognized by its very nature is expensive. (Indiscernible) was a culmination --

THE COURT REPORTER: I'm sorry, Ms. Christenson, you're cutting in and out. Can you maybe get closer to your microphone?

THE COURT: It seems to work when you're closer, so I think it's rocking that's the problem.

MS. CHRISTENSON: Is this better?

THE COURT: That's fine.

MS. CHRISTENSON: My apologies for that.

This trial was a culmination of four years of litigation, a culmination of hard-fought issues, some of which were litigated multiple times. I want to touch on two points regarding the inherent expense of this case. The first point is that if --

THE COURT: You are cutting in and out. Let me ask you this, and this happens all the time. You don't happen to have a headset, do you? That seems to work much better generally.

MS. CHRISTENSON: I do not have a headset, unfortunately.

THE COURT: Okay. Then I think the key is to just try to be as still as possible and we'll just see if we can make it work.

MS. CHRISTENSON: The first point is that this case was expensive because of the amount of work we had to do. I'll begin with re-underwriting. In its brief, PRMI questions how we could have spent so much on our re-underwriting when we only spent $220,000 on work conducted by Mr. Butler and his vendor Opus. But that massively understates the reality of the re-underwriting work that is required in a case like this.

And I'm in a position to talk about that work

because I have been working on re-underwriting in these cases for the past six years. And as we stated in the Alden declaration referenced in our brief, and we also stated in my declaration, re-underwriting is a multi-level process.

First, we have to find and review all versions of all loan files for each of the loans, which sometimes amounts to hundreds of pages, and we provide those to the experts and vendors.

Next, we have to find all relevant information on each loan, whether it be in a bid tape or in one of the thousands of rows of a database extract, or in an e-mail somewhere in the document production. And that's because we and the expert had to be aware of anything PRMI could point to to argue that a breach was purportedly waived or that RFC purportedly knew about a breach.

Next, we had to find all relevant program-specific guidelines and contract representations for the vendors and experts to assess the loans against.

Next, we sent out subpoenas and reviewed and collected the responses to provide to the expert and vendor.

Next, we retained appraisal, AVM and MLS experts that conducted analyses that fed directly into the re-underwriting report. Here, those experts cost approximately $335,000; and that amount excludes the work we had to do to get those folks the loan-specific information

they needed for their analysis.

After all that expert work, working with the vendors, Mr. Butler could identify the material breaches. At that point we had to cross-check and confirm all of the data points and all of the document citations supporting each breach. We did the same when Mr. Butler provided breach-level responses to Ms. Keith's breach-level opinion.

Moving on to the securitization representations, we spent a third of this trial addressing complicated causation issues regarding the securitization representations in this case. We did not have to devote as much time to that issue at the *HLC* trial. We had the burden of proof at trial on whether PRMI's breaches constituted or could be construed to constitute breaches of so-called pool-wide reps, and also had to demonstrate that those were still breaches despite the so-called fraud disclaimer. And that issue was addressed here much more extensively than any other case.

Next, the bankruptcy issues. We needed experts and lawyers in this case with a very particularized bankruptcy expertise to address complicated issues regarding a bankruptcy case that Judge Glenn said was one of the most complicated he had ever seen. And in doing so, we had to respond to a lot of arguments to prove that the settlements in the bankruptcy were reasonable at trial.

The damages issues. We had to present and defend a very complicated allocation model in this case; and as set forth in our papers, we needed to quantify the absolute worst-case scenario impact of PRMI's criticisms to our monoline allocation model and our trust allocation model.

And because we had to do all of that complicated and time-intensive work for this case, it's not helpful to focus on and dissect specific filings and specific issues as PRMI does. When PRMI attempts to argue that the fees in this case cannot possibly be justified by a specific issue or a specific filing standing alone, PRMI loses the forest for the trees. That way of looking at things is not how real litigants operate. Real litigants look at the big picture and real plaintiffs, like this plaintiff, had to weave together complicated issues so that they could establish each element of required proof. And for those reasons we think a more appropriate way of assessing reasonableness of fees is to look at all of the issues together and look at all four years of litigation in the aggregate.

Point number two. This case wasn't any less complicated than *HLC* and for that reason perhaps the only comparable case to this one is *HLC*. The *Flagstar* case PRMI cites in its brief is not a good comparison. That case lasted one-and-a-half years from complaint to trial. It

only had 107 docket entries from complaint to pretrial; whereas, for this fee and interest motion alone there have been over 90 docket entries.

That case involved only two trusts. This case involved over 500. That damages expert had to calculate how defective loans impacted cash flows to the two trusts; but in doing so, he calculated that by dividing the original loan balance of defective charged-off loans by the total original loan balance of all charged-off loans. And so he did not perform the same analysis as Dr. Snow did in this case. Dr. Snow had to allocate billions of dollars of bankruptcy settlements to PRMI while also taking into account all of the losses and all of the breach rates of hundreds of defendants and other originators.

I stated earlier that *HLC* is the most comparable case to this one. Where we could take advantages from *HLC* we did, but there were also places where there were no efficiencies to be gained from *HLC*. To take re-underwriting as an example, it's true that the vendors and experts had a protocol for reviewing loan files and identifying re-underwriting breaches. But it's not as though we could have copied and pasted the HLC breaches into a PRMI report and called it a day. We had to perform all of the tasks that I described earlier for the first time in this case for these 157 loans. For securitization representations, we had

to look at different trust documents, taking into account the trusts that PRMI loans were securitized in and had to analyze those representations.

And as we all recall in *HLC*, a lot of the breaching loans were securitized into trusts that had a compliance with guideline representation, and we know that that was not the case in this trial. We also had different fact witnesses here. It's not as though we could take a cross outline from *HLC* and use it for Mr. Zitting, and the same is true for all new PRMI witnesses who appeared at trial or were deposed.

And the fact that the extrapolated damages in *HLC* were higher than here does not mean that we had to do less work in this case. That fact is merely a consequence of the efficiencies realized by sampling because, again, in *HLC* we had to analyze 150 plus specific HLC loans, just as in this case we had to analyze 150 plus PRMI specific loans.

Turning to efficiencies. As we have said before, whenever possible ResCap used knowledge gained from Wave One and also attempted to use Wave One rulings. As a consequence of those efforts to streamline, we gained efficiencies.

Your Honor, I have provided the Court with three table demonstratives. Those tables, Your Honor, I think are helpful to demonstrate the efficiencies that ResCap achieved

in this case as compared to *HLC*. The information in those tables is based on information on page 2 of Exhibit 54 to the supplemental declaration of Jill Horner, which is docket number 105 in this case.

And these tables reflect the number of timekeepers' hours and fees that relate to the *HLC* action for the five months leading up to and including trial, which was the period from July 2018 to November 2018. That is compared against the number of timekeeper hours and fees in this action for the six months leading up to, including, and after trial, which is the period from November 2019 to April 2020. And I should also say that the data in these charts relate to the data that underlie the fee requests that were submitted in each of those cases.

So turning to the first table which reflects "timekeepers" at the top, as Court can see, in *HLC* that number was 137 individuals. In PRMI it was 37 individuals. That means there were 100 fewer timekeepers in PRMI, which amounts to 73 percent fewer timekeepers.

This table demonstrates or reflects hours at the top of the graph, and there the number of hours in *HLC* is 40,698.4. The number of hours in PRMI is 11,681.5. That means there were 29,016.9 fewer hours here, which is a difference of 71 percent fewer hours.

The final table reflects fees at the top portion.

There, in *HLC*, fees amounted to $13,851,133. Here, fees amounted to $4,636,890. That means there were $9,214,243 fewer in fees here, which is a difference of 67 percent fewer fees.

One note on the timekeepers. Our trial team in this case was different from the *HLC* trial team, not only because we used less individuals but also because we used relatively cheaper attorneys that had been involved in these cases from the start. Spencer Fane, who has a relatively lower billing rate, served as the co-counsel, including because of their deep familiarity with these cases and with RFC's prior business.

We also promoted more junior attorneys with relatively lower hourly rates to leadership positions; and so I, as an associate, was able to lead all of re-underwriting. I worked on the reports. I first chaired the depositions, and I was able to examine my first trial witness and handle the objections during Mr. Butler's cross-examination that was conducted by a partner for PRMI's counsel, and that was different than the role I served in *HLC*.

And the same applied to my colleague Mr. Miller who is also an associate at my firm. He led the charge on arguments raised by PRMI's experts, Mr. Burnaman and Professor Schwarcz, and he was able to first chair their

depositions and take their cross-examinations at trial, and that was different from his role in *HLC*.

And once again, we tried wherever possible to cut costs and streamline. Where we could, we did; but there were also certain instances where we were unable to do so. And with the Court's permission, I will hand it back to Mr. Nesser who will address some of those instances.

THE COURT: Thank you, Ms. Christenson.

MS. CHRISTENSON: Thank you, Your Honor.

MR. NESSER: Your Honor, picking up where Ms. Christenson left off, I wanted to say that it wasn't only associates who were kind of put in leadership positions. My role here and Mr. Alden's role and Mr. Scheck's role were also significantly larger in this case than they were in the prior case, and that wasn't by accident. That was a deliberate decision that was made to keep things -- to keep the team tighter and to keep the team cheaper. And so those were the kinds of steps that we took wherever we could to make things work more efficiently.

But, Your Honor, I wanted to address the issue of proportionality because we hear a lot about that in PRMI's brief and I'm sure we'll hear a lot about it today. And, Your Honor, it didn't and it doesn't escape our attention that our motion is asking for a lot of money. It also doesn't escape our attention that the amount of fees we're

requesting exceeds the size of the damages award and we're sensitive to that. We didn't seek an award of that nature lightly, but it's the right award. It's the right award under the contract. It's the right award as a matter of law, and it's fair. It's the fair real world fair award.

As to the contract, Your Honor, PRMI freely entered into a contract in which it agreed to pay the Trust's fees; and the Court held in *HLC* that when assessing the fee request, I think it's appropriate to be mindful of the fact that there was no reasonableness requirement negotiated in the indemnification clause. Your Honor in *HLC* held that it's nonetheless appropriate to conduct a reasonableness analysis and we're not suggesting that the Court ought not do that here. But the Court in *HLC* indicated that that's an appropriate factor to keep in mind for contextual purposes and we believe that that continues to be appropriate.

As to the law, Your Honor, PRMI repeatedly argues or suggests that we're somehow required to show exceptional circumstances or significant benefits beyond the case. But, Your Honor, that's just not the law. The Court held in *HLC* that the amount of an attorney's fee award must be determined on the facts of each case and is within the District Court's discretion. The Court also held that the overall amount is not dispositive and that a court may find

a fee in excess of damages to be reasonable. And so as a legal matter, there's just nothing to the argument.

But I did want to address the issue of fairness because PRMI's argument that our fee request somehow comes as a bulk out of the blue because this case somehow wasn't exceptional or extraordinary, that's just wrong. This case was extraordinary. It's extraordinary, Your Honor, to have issues of structured finance and bankruptcy and re-underwriting and statistics and the appraisals and AVMs and all of the rest. It's extraordinary to have some of the most difficult legal issues that any of us, I believe, has encountered. And, Your Honor, that's part of the reason why we needed 13 trial days in a $5 million case.

But more than that, Your Honor, it's extraordinary for a plaintiff to have to state on the record that they are being forced to litigate issues that cost more to litigate than the issues are worth in the first instance. And we talk about it in the brief and we talked about it a lot as the case was proceeding, but the biggest example of this was the Countrywide loan. We had one loan in the sample. I don't think it was meaningfully disputed that that loan was some -- was worth somewhere on the order of $30,000 in the scheme of the case. And yet that loan was litigated and the breaches in that loan were litigated as if it was a $5 million issue.

And we raised the issue over and over again. Why are we having depositions and expert reports and trial depositions and trial testimony on a $30,000 issue? And we never got an answer to that. There's no answer to that in the briefs either. We don't know why PRMI chose to litigate that way. That was its prerogative. Mr. Remele suggested in his deposition that perhaps there was some extraneous business interests that PRMI had that for some reason they wanted to get rulings on those issues. I don't know. We don't know. But that was a decision that they made and they now have to live with the consequences of that.

The same was true with the monoline allocation. It was a $114,000 issue. I'm not suggesting that's a small amount of loan, but relative to the amount at stake and relative to the legal fees that were expended in dealing with that issue, it was just not proportional.

Your Honor, we had -- and I should say that was a big issue in *HLC*. It was worth a lot of money in *HLC*. It wasn't worth a lot of money here. And so -- but nonetheless, we got an expert report from Dr. McCrary. We had to depose Dr. McCrary. We had to put in rebuttal reports. We had to deal with it at *Daubert*. We had to deal with it at summary judgment. We had to deal with it at trial. I remember vividly. I don't know whether the Court does. When Dr. Snow was on the stand he was cross-examined

by Mr. Johnson for 40 minutes on this issue; and what he said in redirect was, Yeah, that 40 minutes was all incurred by everybody in the courtroom over an issue that was worth $114,000.

Again, we don't know why PRMI chose to litigate that way, but it did. And when you litigate issues of that size knowing and being informed and being told on the record that litigating issues of that size is going to generate fees in excess of the damages at issue, you can't then complain that the fees exceed the damages at issue.

We had the same issue on Assetwise. I won't go into it but that was worth somewhere in the order of $400,000 and was litigated perhaps as if it was worth ten times that much.

Your Honor, all of that is extraordinary. It's extraordinary as well to have a party engage in duplicative litigation. There are too many examples to list. We listed them in the brief. But, I mean, how many times did the Court need to address *UnitedHealth*. How many times did the Court need to address the same issues over and over and over again in the context of expert discovery and *Dauberts*, in limine, summary judgment, at trial.

We had the Ally issue. We had this issue of the supposedly -- there were supposedly two trusts settlements, and it was like whack-a-mole. I can't remember whose

expression that was, but it costs money to deal with that; and I expect PRMI will argue, Well, why should it cost so much money? It's the same issue duplicatively.

But, Your Honor, the Court was there. We were there. It's not as if you can say, Well, it's the same issue. Because PRMI, to their lawyers' credit, consistently argued, Well, this is distinguishable. It's distinguishable for this reason or that reason, and now it's different, and it's not the same posture as it was before. So you have to address -- the parties and ResCap had to address all of that and it's expensive.

And so an issue that would seem to be unexceptional then gets litigated five times. And so, again, you can't then come back and complain that your fees are multiples of what PRMI believes they should have been when that was a consequence of the litigation strategy.

Your Honor, it's extraordinary for a party to waive a jury trial and then come back two years later and say, Well, we're okay with a bench trial; just not in front of this Court. That's not ordinary.

And, Your Honor, in their surreply brief what they say on that issue is, Well, that was only a 19-page brief and it was argued at a regularly-scheduled hearing. Come on. That's not the issue. I mean, really? The point is ordinary litigants don't behave that way. That's

extraordinary. And that's the way they behaved, Your Honor, on every single motion on every single issue in this case and it's the way they continue to litigate this case. The fee motion that we're dealing with now is emblematic of that. Ordinary. Ordinary, Your Honor, is opening brief, an opposition brief and a reply. This motion could have existed of just those filings.

Ordinary doesn't require an expert to opine on issues that the Court already addressed. Ordinary doesn't require anything of what we dealt with here. Here's what extraordinary looks like, Your Honor. We filed our opening brief. We got a long letter plus a lengthy expert declaration. The Court had to issue two orders addressing those and conduct an in camera review, all of that on the issues of redactions that the Court had already dealt with in *HLC*.

Then we got a 43-page opposition brief, plus a long expert report. The expert report didn't even address the issue of reasonableness. It just again essentially litigated the question of whether our redactions permitted an assessment of reasonableness.

And then we filed a reply in response to which we got a 4-page, single-spaced letter in which they move to strike three of our declarations, a 10-page surreply, a 19-page surrebuttal report from Mr. Remele, a 25-page

surrebuttal declaration from Mr. Smallwood. Four filings, 60 pages on a surreply.

Your Honor, Ms. Christenson noted earlier that in *Flagstar* there were 90 some odd docket entries up until trial. Here we had 90 some docket entries on this motion alone. That's not ordinary, and we don't think it was appropriate to have litigated this motion that way. We understand PRMI disagrees with that, but what's not debatable is that that's just not an ordinary way to proceed. That's exceptional by any measure.

And, Your Honor, this is all in the context where the Supreme Court of the United States has said that the Court's job is merely to do rough justice and that an attorney's fee application shouldn't spawn a second major litigation. And, Your Honor, I haven't had a chance to study in detail the slides that Mr. Nicholson circulated shortly before argument, but I looked at them very quickly and the first words that came to my mind were the Supreme Court's admonition that the Court is not to engage in a green-eyeshade exercise. I mean, that is what they are. Tiny small font. Pages and pages of close analysis of individual entries. That's not what this is supposed to be about.

Your Honor, the last kind of module that I wanted to talk through is specifically to talk about this word

"proportionality" because we hear so much about it, so let's talk about it. Your Honor, if you would please -- if the Court would please look at the hand-up or the exhibit that we circulated in advance of the argument, what this is is we've gathered here 16 different instances in which we said on the record in open court, Hey, PRMI, if we proceed this way, we're going to have to spend money in attorney's fees in an amount that is not proportional to the size and needs of the case. That was the word that we used, "proportional," because we saw this coming.

Your Honor, in April 2018, as is recorded in the hand-up, Ms. Nelson sounded the alarm about wasteful, duplicative depositions. In July 2018 we said the deposition requests were "disproportionate." We raised the issue again in January 2019 and in February of 2019. We said again, "It's disproportionate."

And we raise it again in May of 2019. Your Honor, that was just a few months after we had argued the attorney's fees application in the *HLC* case. And what we said there explicitly, it's on the hand-up I think on the second page, was that -- that if we were going to proceed in the way that PRMI wanted to proceed, which is to say submitting loan-by-loan expert reports on issues where the Trust has sole discretion, if we were going to proceed that way, that we didn't want to hear when it came time to an

attorney's fee application precisely the kind of arguments that we're now hearing.

And Your Honor issued an order saying that's correct. We should not have loan-by-loan expert rebuttal reports on issues where the Trust has sole discretion. PRMI, respectfully, did not abide by that order and we'll come to it in a moment. As shown in the hand-up, though, we raised this issue of proportionality twice in June, again in August.

And I remember that letter, Your Honor. What we said was we -- and this is on the issue of these rebuttal reports. After Your Honor issued an order saying you shouldn't have loan-by-loan analyses of loans where the Trust has sole discretion because of the issues of proportionality that we had raised, we got a report that did exactly that except it somehow attempted to find a loophole or an exception to the Court's order and said, Well, no, this isn't a sole discretion issue. This goes to our good faith and fair dealing defense, which then of course got rejected by the Court on summary judgment.

But that was, I think, again, emblematic of what happened. We had a ruling and then we had every possible creative, clever argument to try to evade those rulings; which again, is the prerogative of PRMI and its counsel, but there are consequences of litigating in that fashion. And

the purpose of our letter in August was to make a record of that for this precise situation.

We raised the issue again in September. What we said was, "We wanted to make a record now for purposes of any forthcoming fee application as to PRMI's unapologetic insistence on processes that will require the Trust to waste time and money litigating settled issues."

Again on September 17, again in December, repeatedly in January. In January we framed the issue in terms of, "the size of the case, the dollar amount of the trusts claimed in the aggregate, the relative significance of the various disputed issues, and proportionality." Those were the words we used.

We also invoked the issues of attorney's fees. I remember asking whether PRMI would stipulate that it was reasonable to spend $50,000 in attorney's fees on a $30,000 issue. We got no response then. We have no response now.

We raised the issue again in February.

And so, Your Honor, when we hear criticism about whether our fees were proportional to the dollar amounts at issue in the case, we don't have a lot of sympathy for that argument because we've spent the last year and a half talking about proportionality of fees relative to the size of the case. We didn't want to proceed this way but I don't know what more we could have done. PRMI was on notice of a

contract. They were on notice of the *HLC* fee award. They were on notice that our fees were increasing. They knew that the Trust was open to a settlement here, just as it settled dozens and dozens of other cases before the Court, but they elected to take a risk and proceed to trial. That was their right. But they weren't successful at trial and the Trust now should not be left holding the bag for the consequences of those decisions.

That's all I have, Your Honor.

THE COURT: Thank you, Mr. Nesser.

All right. Mr. Nicholson.

MR. NICHOLSON: Thank you, Your Honor. With the Court's indulgence, I'll just set up the podium real quick.

(Pause in proceedings.)

MR. NICHOLSON: Good morning, Your Honor. Matt Nicholson for -- from Williams & Connolly for PRMI.

I'd like to begin by addressing plaintiff's motion for attorney's fees and costs and then I may, if there's any time remaining, address their motion for pre-judgment interest.

In its motion plaintiff is seeking $13.84 million in fees and costs in a case where it sought and obtained just $5.4 million in damages. Mr. Nesser talks a lot about the real world and what's ordinary, but the reality is it's not ordinary and it's not normal in the real world for

parties to incur such massive costs in pursuit of damages of $5.4 million absent a fee-shifting provision.

And so what's going on here, Your Honor, is that the plaintiff in this case, because it had an expectation that its fees could be shifted, decided to litigate, over-litigate this case from the very beginning; and I'll demonstrate that today, and that is really the reason why plaintiff's fees are so high.

Mr. Nesser talks a lot about defenses. He doesn't once talk about the hours that plaintiff spent responding to any of those defenses. He doesn't once explain any math by which he can reasonably explain how hours could have added up to 28,700 in this case.

And Ms. Christenson for her part spent the day talking about issues which, at best, account for only a fraction of plaintiff's massive fees. Plaintiff -- she talks about issues that largely had been addressed in prior cases, and she talks about re-underwriting issues that should have accounted for only a fraction of $13.84 million, and in fact by their own estimate does, so that doesn't get them anywhere close.

But, Your Honor, I want to just give a brief summary of our affirmative points about why the motion should be denied or substantially reduced and then I'll circle back and address these in a little bit more detail.

But the first is that plaintiff cannot show that it was reasonable to spend such massive fees in light of the nature or difficulty of this action. Mr. Nesser says the action was extraordinary. It was in many respects, but plaintiff was not approaching this case on a white slate having litigated dozens and dozens of cases having presenting similar issues in Wave One. And as far as the amount of new litigation activity goes, this case was far from extraordinary; rather, it involved about a relatively standard amount of standard litigation activities like depositions, trial days, hearing days, et cetera.

And as to proportionality, there can be no question that plaintiff's request for $13.84 million is grossly disproportional to the amount involved. Contrary to Mr. Nesser's contention, plaintiff does have to show some exceptional circumstance to get such a large fee and cost award. Courts in contract cases will rarely grant fees that even exceed the amount of damages involved. Here, they are going above that by several million dollars. Clearly, they have to show some exceptional circumstances like a larger benefit, and plaintiff can't point to any such thing.

Third, plaintiff hasn't even adequately documented its hours in this case. Instead they provided zero invoices for its law firms for the vast majority of the case, and redacted its invoices to the point of being indecipherable

for the other periods. And insofar as they did produce information, it only underscores that 28,700 hours were excessive and unreasonable.

Plaintiff, as I said, did not at one point in this case, in this argument, identify the hours it spent on any particular activity. Ms. Christenson says, Oh, well, that wouldn't be helpful. Well, Your Honor, that's exactly how courts approach these questions. They ask how many hours are reasonable to spend on document discovery? How many hours are reasonable to spend on depositions? How many hours are reasonable to spend on summary judgment, et cetera. Plaintiff cannot give any numbers for those different periods of the case, and it doesn't and it can not because there is no reasonable way to show the math in this case that adds up to 28,700. We've given plaintiff time and time again to come forward with that math and they haven't done it.

And that's not being a green-eyeshade accountant, Your Honor. That's just asking for what's done in every single case involving fee petitions. Parties come forward with documentation of their hours and how much they spent on particular activities. Plaintiff hasn't done that because it can't do the math.

And so what is the plaintiff left with? Well, it's left with trying to shift the blame to PRMI for

engaging in wildly disproportionate spending; but again, they can't identify the hours they spent on any of these expenses that they complain about.

And, Your Honor, after they submitted their reply I went back and looked at their records to see what was the point in this case in which their spending on fees and costs surpassed the amount at issue of $5.4 million. And it turns out, Your Honor, that by July 2019 plaintiff had spent $5.66 million on this case. That was before PRMI even submitted an expert report. That was before PRMI litigated any of these issues that plaintiff complains about.

And that shows that plaintiff never made any serious effort, Your Honor, to calibrate its spending to the amount involved. Instead, it over-lawyered this case from the beginning; and the facts, which I'm going to go through today, not as a green-eyeshade accountant but just at a high level, show that this was the case.

Now, one more preliminary point and that is that Mr. Nesser complains about the way that we litigated this fee petition. Well, to begin with, this fee petition is multiples of the size of damages award that they sought and obtained, so it's hardly unreasonable for PRMI to ask that plaintiff do basic things like explain how many hours it spent on particular activities. But setting that aside, the reason that this issue is litigated the way it was is

because of plaintiff's own litigation choices.

What did it do? It filed an initial fee motion that was extremely short with a perfunctory brief providing little explanation of the hours. It attached a cursory declaration for Ms. Christenson which addressed only high-level events that didn't come close to justifying its hours; and it attached volumes of exhibits with no explanation and with key information redacted or missing entirely.

So how did we respond to that? Well, we sought basic discovery that typically is granted in any case, and we retained an expert to look through this. And what did we find? We found that plaintiff could not remotely justify its massive hours at each stage of the case. And so how did plaintiff respond? Well, it sought to use its reply brief as a do-over. So it's a little bit hard to swallow Mr. Nesser's complaints about litigation within litigation when plaintiffs told us for the first time on November 2nd that it was going to submit an expert reply for the first time along with its reply brief.

And it turned out that after doing so, and blowing up the schedule in this case and having to delay this hearing by over a month, plaintiff finally came forward with that expert report and what did it say? Well, it didn't say much, Your Honor. It never opines that plaintiff's fees are

reasonable. That expert reviewed all of plaintiff's fee submissions and not once could he opine that the fees were reasonable, not for a single period of the case. There's perhaps no more damning indictment of plaintiff's motion than the fact that its own hand-picked expert cannot opine that its fees are reasonable.

And what else did it do? It submitted a new do-over supplemental declaration for Ms. Christenson which identified a bunch of events that she blamed us for not addressing in our motion, but of course those were events Ms. Christenson did not even deem important enough to put in her initial declaration. And the events she pointed to, as we set forth in the Smallwood declaration, were largely just routine litigation events, like 3-page letters, 2-page stipulations, joint agendas, routine meet and confers, that can't remotely justify the massive expenditures and hours in this action.

So, Your Honor, with that introduction, I want to make a few brief remarks about the legal standard because Mr. Nesser brought it up. Mr. Nesser points to the fact that the contract and the fee provision that they rely on doesn't use the word "reasonable" but, as we explain in our brief and this Court recognized in the *HLC* case, as a matter of public policy courts read reasonable requirements into contracts and the Court should do so again here. Plaintiff

doesn't seriously contend otherwise.

And to the extent plaintiff is contending that this is somehow a relaxed reasonableness standard or maybe a reasonableness minus standard, there's simply no merit to that contention. Courts in Minnesota apply a reasonable standard and it applies with equal, if not greater, force in the contract context.

I refer the Court to cases like *Best Buy* or *ISystems* where courts in a contract case context apply the reasonableness test with just as much or more rigor than in noncontract cases.

And, Your Honor, that takes me to a point about how the standard works. Under this standard, the lodestar standard, it's plaintiff's burden to both document the appropriateness of its hours and to prove that they are reasonable. It's not our burden to come forward based on information that we only have a partial fixture or two and to show that it's unreasonable. So we've looked at their submissions. We've done even more, gone beyond that and done an expert analysis, and we've shown that they can't demonstrate that these fees are reasonable.

And one more point, Your Honor, about the legal standard and that is what I brought up at the beginning, and that is that a plaintiff in a contract case can't simply choose to run up massive bills and pursue a Rolls Royce

prosecution and then expect to be able to shift the full amount of the bill to the defendant. The plaintiff is free to choose to do that and to pay its own way, but when it comes to fee shifting, it can only shift the amount that is reasonable.

And that gets to the core problem of this case. Plaintiff complains a lot about defenses and PRMI's decisions, but the reality is it chose from day one to litigate this case in a Rolls Royce fashion. That wasn't our fault. That wasn't our decision. That was plaintiff's decision. They chose from the very outset of this case to litigate aggressively, and I'll discuss this in more detail later, but before the stay was even lifted in this case they billed 5,810 hours. Before the fact discovery and opening expert reports were done they billed 11,996 hours. And through expert discovery and opening summary judgment and *Daubert* briefs they billed 16,170 hours. That's not a plaintiff responding to defenses. That's a plaintiff that chose to aggressively litigate this case in a Rolls Royce fashion from day one.

Now, with respect to the first *Hensley* factor, plaintiff hasn't come close to showing the nature or difficulty of this action somehow justifies its massive, massive fee requests. Although Mr. Nesser is correct that this case involves complex, quote, unquote, extraordinary

issues, plaintiff's firm didn't approach these issues -- its firms didn't approach these issues on a blank slate. To the contrary, they had already litigated these issues, many of them, similar issues in scores of Wave One cases. As part of those prior cases, they developed the legal theories and the expert methodologies that they later recycled in this case.

To take just a few examples, they developed a sampling and damages methodology, an analysis of the reasonableness of the settlement, an automated valuation model, protocols for re-underwriting, and re-underwriting results for a global sample, all of which they repurposed here, which makes it even more shocking that they somehow managed to bill 28,700 hours and counting.

Now in terms of litigation events, the case was hardly extraordinary. Mr. Nesser talks about all these issues about the number of depositions and whatnot; but if you look at the actual facts, you'll see that this case did not involve an extraordinary number of those events. For example, there were 14 fact or 30(b)(6) depositions. That's less than the default rule of 10 per side and it's hardly unusual in a commercial contract case. There were seven expert depositions, four of which were half days; several of which involved were that had previously testified in the *HLC* case and Wave One generally.

There were 15 case management conferences, and twelve of those were brief hearings following much longer Wave One conferences. There were four motions hearings. That's hardly unusual. Two of those were telephonic.

And the dispositive briefs in this case were all within standard limits and incorporated in prior briefing. There was one pretrial conference. There was a bench trial of 13 nonconsecutive days. Mr. Nesser acts like that is somehow extraordinary in a commercial case, but even their own expert admitted that that's not an extraordinary length for a bench trial. And on top of that, one of the 13 days was 42 minutes with no witnesses. So none of this somehow justifies their exorbitant request for $13.84 million in fees and costs.

So faced with these facts, Ms. Christenson tries to seize on what she calls the case-specific issues. And, Your Honor, of course there were case specific issues in this case. There are case-specific issues in every case. So the fact that there are case-specific issues doesn't make this case somehow different or extraordinary. What makes it extraordinary, to use Mr. Nesser's word, is that plaintiff had already litigated some of the issues in Wave One and just recycled its work product on those issues here.

For example, in their summary judgment brief, they move for summary judgment on 19 issues for which they

incorporated prior briefing. The Court then granted summary judgment to them on virtually every one of those issues. That's not normal in a contract case for a party to be able to do that. They resolved massive chunks of this case by just filing a brief with basically just staccato sentences saying grant summary judgment on this, grant summary judgment on that. And insofar as there were case-specific issues, those issues I think can reasonably account for only a fraction of their massive fees.

Now to take an example of that, Ms. Christenson talks about trust-level representations. But trust-level representations were an issue in Wave One. In fact, by plaintiff's own admission, that constituted 100 pages of testimony in the *HLC* trial. And yes, it was a bigger issue here. Of course it was. But the fact of the matter is that these were not new issues to plaintiff. It had litigated them before. And in fact in their summary judgment opposition in this case they said that First Wave defendants have made "the same arguments about different trust representations."

And then furthermore, PRMI's two main experts on this topic, Professor Schwartz and Mr. Burnaman, had submitted virtually identical reports on trust-level representations in Wave One, and plaintiff's main expert on this issue, Mr. Hawthorne, also submitted a report that was

virtually identical to Wave One. So plaintiffs can hardly claim that it was somehow addressing this issue for the first time.

Now, Ms. Christenson also pointed to loan specific re-underwriting and, Your Honor, again, that was a case-specific issue, but plaintiff didn't approach it on a blank slate. Why? Because plaintiffs had already re-underwritten its global sample in Wave One. It simply used its results here.

Plaintiffs also had developed the re-underwriting protocols in Wave One that it later repurposed here, and re-underwrote loans using this protocol just as it had done in dozens of other cases.

Moreover, the amount of loan re-underwriting in this case was far from extraordinary. To take -- to focus on the PRMI sample, there were 150 loans. Plaintiff chose to add seven later. Mr. Butler alleged breaches on only 75; five of which he later dropped. And because of the Court's ruling, PRMI was only allowed to challenge loan-level breaches on 28 loans in its initial expert report and only 12 loans at trial.

And how long did it take for Mr. Butler to testify about those 12 loans at trial in the vaunted loan-level trial presentation? Well, by plaintiff's own estimate it was 50 pages, which is 2 percent of the transcript. Again,

there's nothing unusual about this, nothing shocking about this, that would justify spending so much.

You know, we cite in our brief the example of the *Flagstar* case, a case where the plaintiff's expert re-underwrote 800 loans, alleged breaches on 606. The defendant's expert challenged breaches on 123. There was a 12-day trial. Two experts testified about the details of over 20 loans. The plaintiff in that case claimed attorney's fees of only $3.69 million as compared to the over $10.39 million in this case.

Now, plaintiff now tries to brush that case aside despite the fact that it was by plaintiff's own telling in the *HLC* case the landmark decision involving a lot of issues of first impression, it was incredibly important, and involved a lot more re-underwriting than this case. Plaintiff also says, Well, damages were different in that case. That case was a loan-level damages case and in our case we had to allocate the settlements. Well, sure, that's correct. But Dr. Snow had developed all of his damages models in Wave One that he used.

The only distinction between the damages models in Wave One and in this case was that Dr. Snow later offered two alternative monoline calculations that he said shouldn't even be used. That's hardly, you know, a major driver of fees and it's inexplicable to me why counsel would have

spent huge amounts of hours working on that issue for plaintiff's side. And the issue took up only 2 percent of trial. So, you know, this simply -- these issues that Ms. Christenson points to simply can't explain their massive fees.

So a few more points on this. On the issue of re-underwriting, they spent only $235,000 for Mr. Butler and his support firm Opus to do all of the PRMI underwriting work in this case, including the initial re-underwriting, the preparing of the expert reports, testifying at deposition and testifying at trial.

Now, plaintiff says they had to support Mr. Butler, but it's hard to imagine why that would justify expending many multiples of $235,000 given that Mr. Butler presumably was doing his own work. The same is true of their AVM and appraisal experts. Those billed just $281,374 for PRMI sample work for the entire case, which is just 2 percent of plaintiff's total requests. Those experts also largely recycled their reports from the initial Wave One and they didn't even testify at deposition or trial so it's hard to see how plaintiff can reasonably say it spent an enormous amount of time supporting those experts.

And, you know, again, it's notable Ms. Christenson provides no specifics. How much time did you spend supporting Mr. Butler? How much time did you spend

supporting Mr. Lee? Supporting Mr. Kilpatrick? No answers are given because plaintiff knows that the math just simply doesn't reasonably add up.

Ms. Christenson also pointed to an estimate by Mr. Alden in a declaration that it cost $8,000 to re-underwrite each loan. Well, Your Honor, first of all, that declaration is not supported by a single invoice. It doesn't have any case-specific information in this case. It was something they submitted during expert discovery in connection with Dr. Snow's report.

If you look at the actual spending in this case, they spent only 516,000 on all expert reports, all expert work related to the PRMI sample, including Mr. Butler's deposition and trial. So it's hard to see how they can go from 516 to what is their estimate of $1.2 million. But even if you credited this assessment of $1.2 million on re-underwriting, that's still a fraction of $13.84 million, which is their request, so clearly this doesn't get them anywhere near all the way.

Ms. Christenson on this issue also pointed to contract matching and guideline matching. She pointed to bid tapes. She pointed to database extracts. She pointed to all kinds of things. But we asked plaintiff's own expert about this. You reviewed plaintiff's submissions. In any submission, did they identify the number of hours they spent

reviewing loan files? No. Can you opine that the amount of hours they spent reviewing loan files was reasonable? No.

And so it's a bit rich for plaintiff to accuse us of not having accounted for the hours they spent on these tasks, given that they didn't even produce documentation showing those hours and their own expert couldn't even offer such an opinion.

As far as contract matching goes, plaintiff had done that exercise in dozens of prior cases. It's a document review exercise in essence, and it can be done by lower-billing attorneys; so it's hard to see how that justifies a massive chunk of $13.84 million.

And as to guideline matching, Ms. Christenson acts like that was the responsibility of counsel which came as a bit of a shock to me because I went back and read Mr. Butler's report which says he did the guideline matching, not counsel; and he did so by matching guidelines to Client Guides simply by lining up the commitment date to the date of the Client Guide. It's hard to see how that would, reviewing Mr. Butler's findings on that mechanical exercise, would justify some of the enormous amount of fees.

So, Your Honor, all these arguments about the difficulty of the action, they at most account for a small fraction for what plaintiff is seeking here. They don't come close to justifying $13.84 million.

And that takes me to the next of the *Hensley* factors and that's proportionality.

Now, there certainly is no mechanical rule that you can't go above a certain percentage of the recovery in a case. There's no one-size-fits-all approach to that. But what there is is a principle that the Minnesota Supreme Court has repeatedly recognized in cases like *Green* and *Asp* that courts must consider the amount in issue in deciding reasonableness. And there's a good reason for that and that is that attorneys are supposed to exercise billing judgments. They are supposed to take into account the amount at issue in deciding how much to spend. As the Eighth Circuit puts it: Attorneys should not be permitted to run up bills that are greatly disproportionate to the ultimate benefits they may obtain.

And that principle applies with particular force in contract cases. Courts will rarely find reasonable an award that exceeds the amount involved. The plaintiff has to point to some exceptional circumstance like the existence of some larger benefit. Mr. Nesser says he's not aware of any such requirement set forth in cases like the *Krear* case which we cite from the Second Circuit, and it's totally consistent with the cases that their own expert cites.

Of those cases, all but one involve fee awards that were less than the amount at issue; and the one

remaining one involved larger benefits because the plaintiff could point to prospective savings over the term of the lease.

Now in this case, plaintiff's fees were wildly disproportional and there was no larger benefit to justify that. They spent $13.84 million despite knowing from early phases of the case that the amount of damages was about 5.4. And I take it from Mr. Nesser's presentation that they don't actually dispute that they knew that this case involved a lower amount of damages, nor could they really dispute that because they developed their damages methodology in Wave One and even before re-underwriting the PRMI loans they could have estimated what the damages were simply by inputting estimated PRMI re-trades around the global averages. Dr. Snow testified his damages model can be used, can be easily used with any input that you want. Despite all that, plaintiff billed $13.84 million in pursuit of 5.4, which is facially unreasonable.

And I think on this point, you know, it's telling that despite filing multiple briefs in this case, despite filing an expert report that cites a bunch of cases, plaintiff still hasn't cited a single contract case from Minnesota or any jurisdiction that has awarded fees and costs exceeding the amount at issue by millions of dollars, and we're not aware of any such case either. This would be

the first. So that's what would render this case extraordinary to use Mr. Nesser's term.

And as to benefits beyond the case, you know, Mr. Nesser and plaintiff are grasping at straws. They point to the fact that, Well, the *HLC* appeal was pending before the Eighth Circuit; but they omit that the *HLC* appeal as of July 2019 had been stayed due to HLC's bankruptcy. There had been no decision to go forward with that appeal and the appeal ultimately was dismissed.

And more broadly, the idea that on appeal in some other case, which they already prevailed at the trial level, somehow justifies massive spending in this case has no support and it really makes no sense. They say they were worried about adverse precedent. It's hard to see how that matters.

First of all, a decision by this Court at trial wouldn't be precedent in any binding sense on the Eighth Circuit so it's hard to see why that was a concern. And furthermore, they had already prevailed on the same common issues from *HLC* at summary judgment where they moved for summary judgment on 19 issues from Wave One. So they already prevailed on those issues. It's hard to see why they were concerned about adverse precedent. But in any event, these sorts of amorphous concerns hardly justify spending $13.84 million in pursuit of 5.4.

And, Your Honor, you know, plaintiff also points to the pre-judgment interest so I just want to address that briefly. We don't think they are entitled to pre-judgment interest; but even if they were, we don't think it should be included in the proportionality analysis because it merely reflects the time value of money. But even if you did, their combined recovery of 5.4 million in damages plus their claim of 2 million pre-judgment interest only gets them to 7.4, which is still millions below their request for 13.84.

So by any conceivable measure, the amount of spending here was wildly disproportional, and they don't cite any case coming close to justifying such a disproportional award.

And on the topic of *HLC*, now plaintiff spent a lot of time today saying, Well, we billed a lot less here than we did in *HLC*. That's true, Your Honor, but the comparison is completely inapposite. In the *HLC* case not only did this Court award fees and costs that were less than the damages, the Court also -- the *HLC* case also involved an amount at issue many times larger than the amount at issue here. At summary judgment plaintiff in *HLC* was seeking $61 million, which is 11 times the amount at issue here. By the time of trial, it was seeking $40.6 million in *HLC*, which is still about seven and a half times more than the amount it's seeking here.

And plaintiff also ignores a myriad of extensions between the two cases including that *HLC* was the first case to go to trial; that plaintiff could draw upon that prior experience here. And that the Court in *HLC* cited a bunch of facts that distinguish this case from *HLC*, including that there were 150 depositions, I believe 30 to 40 case management conferences, which unlike here actually lasted a long time. Many issues of first impression. And a lot of the witnesses at *HLC* were testifying for the first time; whereas here, several of the witnesses had already testified at *HLC*. So the comparison to *HLC* simply fails.

Mr. Nesser also talks about, you know, how they recovered $1 billion in all of their cases and he implies that that somehow means that the strategy here was reasonable. But the question here is not whether the Trust has been successful in other cases, Your Honor. It's whether it was reasonable in this case to spend $13.84 million going after $5.4 million in damages, and the answer to that is clearly no.

And to the extent they are suggesting that they had some finely-crafted litigation strategy in light of the amount at issue, that's clearly belied by the facts. As I noted at the outset, they blew past the amount at issue by July 2019, before we raised or before we litigated any of these defenses that they complain so vociferously about and

before we had served a single expert report.

Now, turning to the time required, now plaintiff I don't think has come close to showing that it was reasonable to bill over 28,700 hours on this matter. Now to begin with, you know, plaintiff hasn't even documented these hours as required by *Hensley*. As the petitioner, the plaintiff should come forward with documentation of the hours in the form of billing records showing the amount spent and work performed. Without these records you can't assess whether the hours spent on a particular task are reasonable and the opposing party can't lodge particularized objections to particular entries.

Now in this case what did plaintiff do? Well, in its initial motion it sought attorney's fees for the period from December 2014 to July 2020. But it didn't produce any law firm invoices for the months from December 2014 to October 2019, or May 2020 to July 2020. So for at least 62 out of 68 months, that is the period for which they are seeking fees, there are no law firm invoices produced.

What did plaintiff produce? Well, let's take a look. So for Quinn Emanuel, plaintiff produced what are called workbooks. I would like to show the Court one and if you will bear with me for a minute I will try to share my screen. Is the Court able to see that?

THE COURT: Yes. And I also have the printouts

that you sent to our e-mail address.

MR. NICHOLSON: That's fantastic. Thank you, Your Honor.

So, what did it produce? Here's an exemplar of a workbook. You see the names. You see the amount of hours. You see the amount charged, the rate. But what you don't see is any description of the work performed. And without that, it's impossible to tell if these hours that are being spent are reasonable. You know, in fact we asked plaintiff's sponsored expert about this issue. We asked him, So look at Mr. Miller's entry for 9.3 hours on 7-1-19. Can you tell us what he was doing that day? No, I can't. Can you tell us whether his hours were reasonable? No. Can you tell us whether other timekeepers were working on duplicative tasks? No. He couldn't do any of that.

So, Your Honor, I don't think that given plaintiff's own expert can't even tell what its attorneys were doing, you know, surely plaintiff hasn't documented its hours in an adequate way. Again, this isn't being a green-eyeshade accountant. This is a complete absence of information about what these people were doing on particular days.

Now, let's talk about Spencer Fane. What did plaintiff produce for Spencer Fane, and actually also Carpenter Lipps. Well, it just produced these tables that

show the total amount of dollars billed per month. The tables don't show how many hours were spent. The tables don't show what activities were performed. The tables don't show how many timekeepers performed them. The tables don't show whether the timekeepers were doing the same work. And again we asked plaintiff's expert about this and he couldn't provide any of that information or opine whether the fees here were reasonable.

So what's to be done? Plaintiff obviously hasn't produced adequate documentation to show the appropriateness of its hours and the case law shows that there are two potential remedies. One is to deny the motion without prejudice and require them to come forward now with those documents. The other is to reduce the fee request.

And, Your Honor, we're aware that the Court has previously said that they don't have to provide additional invoices in discovery. So to the extent that the Court stands by that ruling, we think the only appropriate remedy is to reduce the request; and these amounts without invoices account for $5.15 million in fees, so we think that should be removed from the petition.

Now if we turn to the period from November of 2019 to April 2020, what did plaintiff produce there? Well, it produced invoices for its law firms but, as Your Honor knows, it heavily redacted them. Now, we're aware that the

Court has said that those redactions were proper in terms of privilege and work product, but there's a separate question, Your Honor, whether they can carry their burden of proof based on those redactions. When a party decides to redact, that's its prerogative as long as it does so for privilege and work product. But that comes with a cost and that is that it may not be able to prove the full amount sought that is reasonable. It can recover from redacted invoices only to the extent that the redacted invoices still have the information necessary to ascertain what the activities were and whether the hours were reasonable; and here the redactions clearly don't permit that.

Mr. Remele has explained that at length; and again, we asked plaintiff's own expert if he could decipher the invoices that were redacted and he could not. He could not tell what timekeepers were doing. He couldn't tell whether other timekeepers were performing the similar tasks. He couldn't determine whether the hours were reasonable.

So, you know, Your Honor, we think that since plaintiff has decided to go this route having redactions, it should not be able to recover for those amounts which amount to $4.9 million.

And, Your Honor, just as a side note, the way that plaintiff chose to proceed here was its prerogative, but it's not the way that other parties have proceeded in this

district when it comes to redactions. You know, during the deposition Mr. Cambronne talked at length about the *Best Buy* case where the Robins Kaplan firm had sought to recover a substantial amount of fees in a contract action. And it attached to its motion fee records with virtually no redactions, despite the fact that there was an appeal pending in that case. That's the typical way that parties go forward. They don't do what was done here which is to veil things in secrecy.

And as to secrecy, Your Honor, it's no answer for plaintiff to say that the Court should now review the unredacted or unproduced invoices in camera. Your Honor, fee proceedings are not supposed to be ex parte proceedings and the due process clause requires that opposing counsel have access to invoices that the Court relies on when awarding fees.

Indeed, the Ninth Circuit has held that it would be an abuse of discretion to consider unproduced invoices in camera. The Ninth Circuit did that in a case involving an award of just $2.3 million, so we think the ruling applies with even greater force here where plaintiff is seeking upwards of 10 million in fees, not to mention costs.

And on top of that, plaintiff's approach here is fundamentally unfair. Plaintiff hasn't provided documentation of the hours its attorneys spent on tasks. It

hasn't even summarized at a higher level how many total hours its attorneys spent on a particular task. Yet it's expecting the Court to go back behind closed doors, review its invoices, determine the amount of time spent on particular tasks, and then determine whether those hours were reasonable. That not only would impose a heavy burden on the Court, but it would entirely deprive PRMI of an opportunity to weigh in on the process.

For example, the Court might look at a particular entry on a particular day or even a series of days and think that the entry seems reasonable in isolation. But PRMI should have the opportunity to show that numerous timekeepers were billing for duplicative tasks, which as I'll show here is a very, very serious concern. Under plaintiff's approach, Your Honor, however, we're completely deprived of that opportunity.

Now, you know, we think that because plaintiff hasn't produced adequate documentation, it shouldn't be allowed to recover for its fees. However, if the Court goes on to consider the limited information produced, it only underscores that the hours that plaintiff's firms billed were grossly in excess.

Now, let's take a look at slide 3 just for a moment. Your Honor, this shows the amount of hours billed by plaintiff's firms according to plaintiff. These are

hours that we cannot verify based on the information produced. But if we take them at face value, they show a massive amount of billing. 15,685 hours by lead counsel Quinn. 12,614 hours by legal counsel who moved from Felhaber to Spencer Fane, and 469 hours by a third firm Carpenter Lipps. On their face these are massive hours, particularly in a case involving just $5.4 million in damages where plaintiff had already litigated similar cases in the past.

THE COURT REPORTER: Mr. Nicholson, can I please ask you to slow down.

MR. NICHOLSON: Sure. Sorry.

And, Your Honor, these hours raise very serious questions about duplicativeness. On its own, lead counsel in this case billed nearly 16,000 hours, yet legal counsel still managed to bill an additional 12,614 hours in a supporting role. And plaintiff has provided no persuasive explanation for that massive amount of hours. And Ms. Christenson points to the fact that local counsel had a, quote, longstanding relationship with RFC, but at most that explains why they were hired, why they were retained in this case. It doesn't explain why they went on to bill 12,600 hours.

You know, they also point to things like depositions and Ms. Christenson's declaration. But local

counsel took only one deposition, which was during trial, and defended zero. While they attended six, there's been no showing that that was even necessary; that they performed any work that was non-duplicative of work by lead counsel.

They also talk about case management conferences. Well, as I talked about earlier, 12 of those were very short hearings after Wave One conferences. We went back and looked at the transcripts for those. It turns out that although Ms. Christenson said local counsel made a bunch of arguments, local counsel made the presentation at only two of the 12, and those took only 16 pages total. And at the three conferences after the stay was lifted, local counsel didn't make any presentations at all.

Now, you know, the same trend continues with summary judgment, *Daubert*, pretrial. They didn't make any arguments at any of those hearings. Now, at trial, local counsel cross-examined just one witness, accounting for less than 2 percent of the trial record. Local counsel also handled admission of deposition testimony and some exhibits, but most of those were uncontested issues and local counsel's presentations accounted for less than 25 pages.

So it's hard to see how these supporting tasks could justify billing 12,600 hours, which is what you would expect from a lead counsel, not a local counsel in a supporting role.

And, you know, ultimately what plaintiff is arguing in Ms. Christenson's declaration is that local counsel assisted lead counsel on all these different activities. But, Your Honor, that underscores the problem here. Plaintiff is free to have, like I said, a Rolls Royce prosecution where it hires two firms to basically litigate full time. It has one firm, quote, unquote, assisting the other. But it can't shift those fees to PRMI after the fact. That's simply not reasonable.

Now, plaintiff also hasn't offered any explanation for Carpenter Lipps, who I didn't hear much about during their presentation today. Carpenter Lipps's hours are less than the other two firms to be sure, but they are still unreasonable. Plaintiff certainly hasn't shown otherwise.

Carpenter Lipps billed 469 hours despite the fact that its only appearances in this case were to defend two depositions and to listen to a third deposition by phone. They never argued a motion, never examined a witness, never recorded an appearance at trial or in court generally. As far as we can tell from the invoices, which are redacted, Carpenter Lipps spent most of its time, or at least a large chunk of it, simply reading filings that were already on the docket or conferring amongst each other about those already filed documents.

And more broadly, they spent time travelling back

and forth from Cleveland to St. Paul to attend all the hearings in this case, including summary judgment, *Daubert*, pretrial, and every single day of trial.

Now, Your Honor, again, plaintiff was free to do that. They were free to pay Carpenter Lipps to do that, but it doesn't mean that they can shift those fees to us. Plaintiff says, Well, Carpenter Lipps had institutional knowledge about RFC; but surely Quinn Emanuel, who had been representing the ResCap Liquidating Trust for years, had sufficient knowledge; and if they needed to ask Mr. Lipps a question, he was only a phone call away. He didn't need to sit through every single day of trial, much less every hearing, and bill at about $414 an hour, I believe, or $410, something in that range.

They also say that Carpenter Lipps attended trial because it had background of fact witnesses. But, Your Honor, Carpenter Lipps didn't even attend the depositions of two fact witnesses that testified at trial, so it's hard to see how that justifies them attending trial for those witnesses. And on top of that, even if they had the background of a few fact witnesses, at most a few days of trial. That doesn't explain why they attended every single day.

And so what is plaintiff left with? Well, the only remaining explanation for Carpenter Lipps's hours is

that Jeff Lipps was listed as a trial witness. Well, Your Honor, by January, early January, the parties were also discussing a stipulation. Although it wasn't formally entered until February before the trial, I don't think there was any serious view that Mr. Lipps would need to testify at trial.

So I went back and I looked at his billing records and it turns out that in the week before trial, Mr. Lipps billed less than 3 hours for the case. It was 2.8 or 2.9. That's before billing dozens of hours for attending the trial. So clearly, I can't tell what he was doing, but clearly he wasn't concerned about having to give some major blockbuster testimony at the trial, which again he never did. So for all these reasons the Court should drastically reduce Carpenter Lipps's hours. At most, it should be covered for defending two depositions, which is a small fraction of 469 hours.

Now, Your Honor, we didn't stop in this case at analyzing plaintiff's hours over the entirety of the action. We actually dug in and tried to figure out what plaintiff didn't do, which was to show how many hours they billed over particular periods. And on that score, you know, we were significantly limited by how little information they produced to us. But our expert, Mr. Remele, did work with the support firm to try to make estimates of those hours.

And what those estimates show, to provide some context, the way they did it was by using those workbooks that I showed you earlier which have hours with no explanations, and they also used those tables that we looked at earlier and divided, say, the Spencer Fane billings by their average rates in the case. And what they found, Mr. Remele and his support firm, was that plaintiff relentlessly billed massive hours over each period of the case.

And, Your Honor, I would refer you to slide 4 which we have provided, and I can bring it up if you would like, but if you're able to just look at it, it may be easier.

THE COURT: I have it in front of me.

MR. NICHOLSON: Okay. Great. So from this chart you can see this pattern. Plaintiff's firms billed over 5,800 hours before the stay was lifted. Almost 12,000 hours due to fact discovery and opening expert reports, and over 16,000 hours through experts.

And the chart also, Your Honor, highlights the problem of duplicativeness. You see that for basically every one of these periods, you've got local counsel billing nearly as many, if not more, hours than Quinn Emanuel was billing. And, Your Honor, even if you credit some of the explanations that plaintiff has provided for these local

counsel hours, this is still not reasonable. Clearly Quinn was taking the laboring oar in this case. Any fair-minded observer who came to trial would know that who dealt with this case, and yet their billings are -- by their lead counsel are almost as large in terms of hours. So, you know, Your Honor, they basically had two firms bill full time throughout this case which is not something that they can shift.

And so if you look at the actual particular periods here, you know, this highlights the lack of reasonableness, how they haven't (indiscernible due to audio distortion) reasonableness. And on this score, I mentioned this at the outset but it bears repeating, we asked their expert, You've looked at this. Do you dispute any of the hours that are here? No. Can you opine that the hours are reasonable for any of these periods? No. He hasn't offered any of those opinions. I think that's telling, Your Honor, that their own expert can't do that.

And as for Ms. Christenson in her declaration, you know, she does go through this period to her credit, but what she does is she just collects routine case files like stipulations (indiscernible due to audio distortion) and the like, but even considered cumulatively can't possibly explain this massive billing.

So let's start with the first period. December

1st, 2014 through December 31st, 2016. This is when the pre-complaint period through filing of the complaint. They billed 105 hours during this period. But while these hours seem small in comparison to the massive hours billed during other periods, I think it shows several trends that continue throughout the litigation.

One is that plaintiff was recycling prior work product. The complaint they filed here largely tracked the complaints they filed in dozens of other actions. Ms. Christenson says in her declaration, Well, it was a carbon copy. That's not the question, Your Honor. That's not the point. The point is they weren't working from a blank slate. They were simply inserting allegations into an existing template so it's unclear why it took so many hours.

They also point to pre-complaint negotiations and time spent entering tolling agreements. But, you know, this illustrates the problem with their approach. They haven't produced time records showing how much they spent on any of this. Also they, you know, from early on you see that they have three firms billing substantial hours in the case which is something that repeats throughout.

Now, Your Honor, if you look at the second period of the case, that's January 1st, 2017 through July 31st, 2018, this is the period when the parties engaged in written and document discovery. Now during this period, plaintiffs

somehow billed 4,784 hours. Now this was a period where there were very few disputes other than routine ones that are raised in any commercial case; and none of these defenses that Mr. Nesser harps on were at issue in this part of the case or litigated in any substantial fashion, yet they billed almost 5,000 hours, and they haven't come close to showing that that's reasonable.

Now, in their initial motion what did they point to? Well, they pointed to the fact that they had produced 300,000 documents during this period. Well, the problem with that argument, as we pointed out, is that they also had a document discovery firm which billed 36,000 hours across Wave Two, including almost 9,000 hours that plaintiff attributes to this case, and that's separate and apart from their massive attorney fees.

So given that that third-party firm billed, by their estimate, 9,000 hours in this case, they can hardly point to document production to explain why their law firm billed another 4,784 hours.

So faced with the failure of that explanation, they offered a number of new explanations on reply; but most of them consist to pointing to two to five-page letters on discovery issues, pointing to the fact that they had to produce a loan list, which they produced in dozens of prior cases. Pointing to the fact that the parties had a dispute

about PRMI's answer, ignoring the fact that the parties entered a stipulation applying the Court's Wave One ruling. And pointing to those case management conferences which, as I explained earlier, were very, very short and followed regularly scheduled Wave One conferences. So none of this explains these massive hours.

And as to Ms. Christenson, Ms. Christenson also points to her arguments about contract indemnification and guideline matching, but I've already addressed those, why those don't explain this either.

Now, the next period is a particularly curious one and that's from August 1st, 2018 through January 31, 2019. This is a period where all discovery was stayed in this case. Despite that, plaintiff's firm inexplicably billed another 921 hours. Now, their explanation for this on reply is that they engaged in lengthy negotiations regarding post-stayed discovery, but it's hard to fathom how they spent, you know, hundreds of hours on those negotiations when this only resulted in them filing a 3-page letter with the Court.

They also say that they began preparing for depositions and expert discovery. The depositions didn't begin until March 21st, 2019; expert reports weren't served until May 30th, 2019, and plaintiff billed massive hours in those periods as well so it can't explain why it was

reasonable to bill 921 hours during this stay.

Now the next period, Your Honor, is February 1st, 2019 to May 31, 2019. The parties engaged in fact depositions and issued expert reports. And during this period plaintiff billed an astounding 6,186 hours amounting to 364 hours per week over a 17-week period. Now, plaintiff has, Mr. Nesser in particular, has tried to blame PRMI for taking depositions, but during this period there weren't that many depositions. Plaintiff took only three fact depositions and PRMI took only eight, which is less than the default rule of ten per side. Well less.

And to put it into comparison, in the *Best Buy* case that I referenced earlier the parties took 65 total depositions. In Wave One I believe there were over 150 total depositions.

Now, plaintiff asserts these depositions were time intensive in terms of preparation, but it nowhere identifies why it took 6,186 hours during this period. Many of the deponents on the PRMI side were persons who held positions in sales or underwriting. They were similar to persons that plaintiff had deposed in dozens of other cases. And of the deponents named defendants, several testified, you know, in other cases and had been prepared to testify before. So again, hard to see why this was such a time-intensive exercise.

Furthermore, plaintiff, as we pointed out in the Clouser declaration, routinely overstaffed these depositions sending two or three attorneys when only one was necessary.

The hours during this period also raise serious questions about duplicativeness. Local counsel billed 2,628 hours despite not taking a single fact deposition during this period. Its only deposition was later.

And with respect to the opening expert reports, these were reports that were largely recycled from Wave One. For example, Mr. Hawthorne's report was virtually identical with only a few minor changes. And plaintiff, you know, doesn't really contest this. Instead, they point out that some of the exhibits to the expert reports contain PRMI's specific information as if that's some eureka moment that proves that their hours were reasonable.

But, Your Honor, it's normal in a commercial contract case to have exhibits that refer to the defendant. What's remarkable in this case is that they were recycling the reports themselves and all the protocols, all the methodologies that had been used during Wave One.

And on top of that, you know, putting together these exhibits was likely expert centric work. Plaintiff says, Oh, their attorneys had to check these exhibits. Plaintiff nowhere identifies how many hours they spent doing all of this, which underscores another problem of their

position. They just point to a bunch of these activities, none of which are all that remarkable, and never tell you how many hours they spent on a single one, just hoping that somehow if you squint and look at the case as a whole you'll come up with 2,700.

Now, the next period is June 1st, 2019, to October 31, 2019 when the parties engaged in expert discovery and filed opening dispositive briefs. Now, during this period plaintiff billed another 4,174 hours, amounting to 190 hours per week. You don't have to be a green-eyeshade accountant to know that that's a lot.

And again, plaintiff hasn't shown these massive hours to be reasonable. During this period, the parties took just two additional fact 30(b)(6) depositions. As to expert discovery, plaintiffs spent most of the period just waiting for us to serve rebuttal reports in August, and then plaintiff served three short reply reports, two of which incorporated work from Wave One.

The parties then took or defended seven expert depositions, four of which were half days. And as to dispositive motions, all of them were within standard limits and plaintiff incorporated prior briefing on 19 of 24 issues in the summary judgment brief.

So it's hard to see why these events required 4,174 hours. That's more, over just this 22-week period,

Your Honor, that's more than courts have deemed reasonable in entire commercial cases in this district. And while plaintiff may say these cases are distinguishable, these are the amounts approved in the entire case. The *Windsor Craft* case which did not involve prior litigation involving similar issues, 3,900 hours. *Best Buy*, a case involving 56 fact depositions, 2,500 hours accrued. So we are leaps and bounds above those amounts, even in this little 22-week period.

Now, turning to the periods with redacted invoices, that's November 1st, 2019 to April 30th, over this period of six months plaintiff's firms billed another 11,681 hours amounting to 64 hours per day for 6 months. That's a staggering amount, again, in a case of this size.

Now, in comparison to the hours billed by PRMI's counsel underscores this point. Over the same period PRMI's counsel billed 6,146 hours. So in other words, plaintiff's firms billed nearly twice as many hours as PRMI's firms did. And one of the primary reasons for that is that plaintiff drastically overstaffed this case with timekeepers.

So this isn't about responding to defenses. This is about overstaffing, Your Honor, and over-litigating. Setting aside the fact that they had 58 timekeepers that they excluded from their bills after the fact, which is dramatic and just shows that they really weren't making any

serious effort to calibrate the number of timekeepers to the size of the case, they are still seeking fees for 37 timekeepers, 12 partners, three counsel, seven associates, 15 staff, over the same period PRMI employed 23 total timekeepers without any deductions. And many of these billed, you know, only a handful of hours, so we could have deducted it to make the comparison more apples to apples.

We had just five partners, three associates and 15 staff. There's no plausible need for plaintiff to employ 12 partners, three counsel and seven associates on a case of this size. To illustrate this point, I think it's important to look at a chart from Mr. Remele's report. That's slide 5, Your Honor. I'm going to bring that one up briefly.

This chart, Your Honor, is broken into two panels. The top panel shows the major timekeepers, the primary timekeepers in this case. These are the attorneys that are trying the case, as well as one paralegal per side. You'll recognize the names in this top panel. Mr. Nesser, Mr. Johnson, Mr. Alden, Mr. Smallwood, et cetera. These are the people who were actively involved in trying the case and taking depositions by examining witnesses, by presenting arguments, et cetera.

You'll see that in the top panel plaintiff's main timekeepers outbill defendant's timekeepers by 5,955 hours to 4,827. That's a pretty sizeable discrepancy. But the

even more notable thing about this, when you look at the bottom panel, and that shows how many secondary timekeepers plaintiff had billing on this case. As you see, they had a legion of timekeepers billing at a very high clip. This is just over six months, Your Honor.

These secondary timekeepers billed 5,726 hours as compared to 1,322 hours. So, Your Honor, this belies plaintiff's argument about how they efficiently staffed this case, how they relied on junior associates, et cetera, et cetera. Yes, they did some of that. But -- as we did, but what this shows is that they were also employing legions of other timekeepers who are billing behind the scenes doing we don't even know what because a lot of the records are so redacted you can't possibly decipher them.

So I think this encapsulates why plaintiff billed so much, Your Honor. It wasn't defenses. It was over-litigation, it was overstaffing. They decided to litigate this case in a Rolls Royce way, and they can only shift fees for what's reasonable. Okay? It's certainly not reasonable to do this, what you're seeing here, in a case involving a damages claim of $5.4 million.

And by the way, there's no explanation provided in any of their filing for what these folks were doing, why their work was necessary or (indiscernible due to audio distortion).

Now, if we look, Your Honor, at particular subsets of this six-month period we'll see that there are even more questions about reasonableness. Consider the period from November 1st, 2019, to December 11th, 2019. Sorry. November 1st. This is when the parties filed their summary judgment and *Daubert* oppositions and replies to the court-held hearings. During this period of less than six weeks, plaintiff's firms billed 1,671 hours amounting to 278 hours per week. Plaintiff again hasn't come close to demonstrating that this was reasonable. All the briefs here were within standard limits. Plaintiff incorporated a lot of prior briefing. For example, a summary judgment brief on opposition to summary judgment, excuse me, largely just recounted issues that they had already briefed in their cross-motion for summary judgment.

And on top of that, plaintiff's invoices, to the extent we can decipher them, show that they drastically overstaffed the summary judgment and *Daubert* hearings. For summary judgment, ten timekeepers billed for attending the hearing but only three presented argument. For *Daubert*, ten timekeepers billed for attending the hearing but only four attended the argument.

Your Honor, PRMI didn't force plaintiff to do this. This was plaintiff's own choice to litigate in a Rolls Royce fashion. Plaintiff's only defense to this is to

say, Well, there could have been issues that needed to be researched in realtime or people needed to provide advice on. Your Honor, that's just another example of them over-litigating this case, trying to be as aggressive as possible. It might have been reasonable to have a few extra timekeepers in support. Having ten to defend a brief, more than necessary to field a baseball team, hardly seems reasonable or necessary.

And again, in comparison to PRMI's time over this period underscores a point. Plaintiff's firm billed 1,671 hours as compared to only 881 by PRMI's firms. And for this period plaintiff can't possibly say that the two sides are engaged in different work. In fact, the two sides were briefing and arguing flip sides of the exact same issues.

And, Your Honor, a daily comparison I think further highlights this point and gives belie to plaintiff's argument about PRMI forcing it to do things. Your Honor, this slide shows a daily summary of hours billed. And what you see here is that plaintiff and PRMI billed radically different hours on days that they were performing the same tasks, plaintiff billing almost twice at much, sometimes almost more than twice as much, than PRMI did.

So consider a few examples. November 12th is the day that both sides file summary judgment and *Daubert* oppositions. Plaintiff billed 115 hours as compared to 54

by PRMI. And you can see here, by the way, that the color breakdown that plaintiff has two firms essentially billing full time on these issues which largely explains why their hours are so massive.

Consider November 26th. Both sides file summary judgment and *Daubert* replies. Plaintiff bills 88 hours as compared to only 27 by PRMI.

Consider the day of the summary judgment hearing. Plaintiff billed 120 hours as compared to 35 by PRMI. Again, Your Honor, did we force them to bill 120 hours for that hearing where we billed 35? Hardly.

Consider December 11th, the day of the *Daubert* hearing. They billed 103 hours as compared to 35 by PRMI. So day after day, week after week, they are billing massively more hours despite doing similar activity.

And, Your Honor, I'm aware that the Court didn't consider the comparison in *HLC* between hours of the two sides to be all that instructive, but we've done a different analysis here, Your Honor, by focusing on particular days when the parties are doing particular -- doing the same types of tasks. And we've also looked at particular periods as opposed to just a six-month period as a whole, and it shows that despite similar tasks, plaintiffs just massively overstaffed and over-litigated this case.

And while I'm here, you'll notice that these bars

up here at the top of plaintiff's hours are Carpenter Lipps, who just parachutes in to attend hearings and bill pretty significant hours for that, despite not making arguments and not even entering appearances.

Now, if we look back at slide 4, which I'll just refer the Court to, the next period is the pretrial period of December 12th, 2019 to February 9th, 2019.

THE COURT: Mr. Nicholson, let me just interrupt you a moment. Can you estimate how much longer your presentation is?

MR. NICHOLSON: Your Honor, I think I'll just go another 10 or 15 minutes.

THE COURT: All right. I am cognizant of the fact that we haven't given the court reporter a break. You have been speaking for I believe over an hour, and we're looking at almost two hours into the hearing. So we're going to take a ten-minute break. While we're on the break everybody should mute their audio and turn off their video.

Ten minutes from now is two minutes past the hour, so at two minutes past the hour I will put my video back on and that's your sign to put your video back on.

All right. Court is adjourned for ten minutes.

(Recess taken from 10:52 to 11:03 a.m.)

THE COURT: All right. I think everybody is back with us again. You may continue but you're on mute, sir, so

please take yourself off. Very good.

MR. NICHOLSON: Your Honor, if I could refer you again to slide 4, which is our summary of the hours billed over particular periods, and I wanted to pick up with the pretrial period from December 12th, 2019, to February 9th.

Now, over this period, we'll see that the trend continues. Plaintiff's firms bill 4,426 hours over an 8.5 week period, which amounts to about 520 hours per week. Again, plaintiff hasn't come close to showing that these massive hours are reasonable. And as we talked about, they had tried a similar case in the past, the *HLC* case, so they should have been able to capitalize on a lot of their prior work product, and I think they did, yet they still billed massive hours.

Furthermore, the amount of pretrial briefing during this period was far from unusual. If anything, it was relatively light for a commercial contract case. Plaintiff filed three motions in limine, each of which was less than ten pages. PRMI filed none. The parties filed short trial briefs, each less than five pages, and the plaintiff filed three letters of eight, four, and one page. Additionally, the Court held just one pretrial conference. None of this is so extraordinary so as to justify billing 4,400 hours or more, which is more than many firms bill in an entire commercial case.

Now, a comparison to PRMI's hours again underscores that this is unreasonable. Plaintiff's firms bill 4,426 hours over this 8.5 week period as compared to 2,210 hours by PRMI's firms. Again, plaintiff's firms billed twice as many hours. So we see the effect of their overstaffing yet again because they have two firms billing basically full time, not to mention a third firm showing up for hearings. They are out-billing us by a factor of two.

So, Your Honor, they haven't shown that this was somehow warranted here. Again, it's not because of PRMI's defenses. It's because of their drastic overstaffing.

So now consider the period of the bench trial from February 10th, 2020 to March 13th, 2020. Now, this is a five-week period and plaintiff's firms again billed a massive amount: 4,117 hours amounting to 823 hours per week. Again, they haven't demonstrated that this is reasonable.

The bench trial was not extraordinary in length. This occurred over the course of 12 nonconsecutive days. In total it was about 95 hours including all breaks. There were a total of 12 live witnesses called, five by plaintiffs, seven by PRMI. Several witnesses had testified previously in the *HLC* case about similar issues, including Bangerter, Hawthorne, Snow, Burnaman and McCrary.

Furthermore, the invoices confirm that plaintiff drastically overstaffed the trial itself. On average, they

had 12.3 timekeepers bill for attending some portion of each trial day, but only 2.6 timekeepers on average actually examined a witness or made some sort of substantive presentation.

Furthermore, Carpenter Lipps billed 125 hours during this eight-week period, mainly for attending the trial itself despite never participating in the trial or even entering an appearance.

And yet again, a comparison underscores these points. During the trial period plaintiff's firms billed 4,117 hours as compared to 2,296 by PRMI's firms. And we should again look at a daily comparison.

If you look at days on which the two sides are performing similar tasks, you see that plaintiff regularly bills twice as many hours. Consider February 10th. This is the first day of the trial when both sides presented opening statements and both sides questioned Mrs. Farley. Plaintiff's firms billed 241 hours on this day alone, as compared to 119.6 by PRMI's firms.

Or consider March 12th when both sides questioned Mr. Crawford and Dr. McCrary. Plaintiff's firms billed 261.9 hours as compared to 100 hours by PRMI's firms.

Next consider March 13th, the day both sides again questioned Dr. McCrary and also both sides presented closing arguments. Plaintiff billed 170 hours as compared to 68.7

by PRMI's firms. Again, these figures, these day-by-day accounts, belie the notion that plaintiffs somehow efficiently staffed this case or that plaintiff was responding to defenses. Instead, it's overstaffing. It's these giant spikes in hours that are due to overstaffing that are driving its hours.

Finally, with respect to the after periods of the case, consider the period from March 14th to April 30th when the parties submitted post-trial briefs. Plaintiff's firms billed 1,467 hours during this period, including 911 hours by Quinn Emanuel and 548 by local counsel. Now, while post-trial briefing was surely a considerable task, I don't think plaintiffs have come close to showing what warranted billing almost 1,500 hours in a case that involved damages of $5.4 million. Plaintiff's only real defense to this is that the brief couldn't be drafted by a, quote, select handful of attorneys and that it somehow required 23 timekeepers.

Well, Your Honor, PRMI's counsel drafted a post-trial brief of comparable length using mainly the four Williams & Connolly attorneys who drafted and tried the case, and we did so in 762 hours or about half of the hours that plaintiff's firms did. So this again illustrates the problem here is that plaintiff is overstaffing in basically having two firms working full time on these issues.

Now, I expect that on reply Mr. Nesser will get up and say that this whole presentation I have done is just being a green-eyeshade accountant. Well, Your Honor, I don't think you have to be a green-eyeshade accountant to know that these numbers present serious problem. Plus, the analysis we're doing here is simply a standard type of analysis that courts do. They look at how many hours are billed over particular periods of the case. And I refer the Court to Judge Montgomery's opinion in the *Windsor Craft* case looking at how many hours are billed to trial, summary judgment, et cetera. And we've done that work here because plaintiff didn't do it.

So plaintiff can hardly take offense or fault us for doing the work that they should have done, and especially they can't do that when they are seeking from us $13.84 million. It's probably too much to ask for them to tell us how much time they spent on major litigation activities in the case.

Now, just really briefly, there are two other periods here that don't have invoices. There's the period from May 1st, 2020 to July 31st, 2020 when plaintiff's firms billed an estimated 376 hours. And the only explanation for these hours, which were after the post-trial briefing and before the Court had issued its decision, that the plaintiff started working on its fee motion. But, Your Honor, we

submit that the Court should deny all fees for this period because plaintiff should not be entitled to recover for fees spent litigating or preparing a fee petition.

We recognize the Court held otherwise in the *HLC* case, but we think the correct view of the law, as stated by the Second Circuit in the *Krear* case, and that there's no Minnesota authority squarely on point. And in that case the Court held that a general contract provision about fee shifting wasn't sufficient to allow fees on fees. Instead, in light of the rule that indemnity clauses are narrowly construed, there has to be a separate provision specifically authorizing fees on fees.

And here, even assuming there was a fee-shifting provision, which clearly there's no specific provision authorizing fees on fees. In any event, plaintiff hasn't produced any invoices for this period so it hasn't shown what its attorneys were doing for 376 hours or why that was reasonable.

Now, the last period is August 1st, 2020 to October 31st, 2020. Plaintiff in its reply brief asserted for the first time that it was entitled to an additional $298,000 in fees and costs for this period. The Court should deny that request.

First of all, we think it's improper for plaintiff to tack on these new claims for the first time on a reply.

We don't have a full opportunity to address them in an opposition brief and in any type of other analysis by experts or otherwise. You know, plaintiff may say, Well, it's $298,000, but that is a lot of money to tack on in a reply brief where the other side doesn't have a full opportunity to respond.

Second, the bulk of plaintiff's new claims appear to involve preparation of its fee petition. As we discussed, we don't think those fees are recoverable, but even if they are, plaintiff hasn't produced invoices for this period showing what its attorneys are doing or whether the hours they billed during this period are reasonable. By my math using average billing rates, they probably billed about 900 more hours during these months and so it can't just be assumed that those hours are reasonable.

Now, plaintiff didn't really respond to any of those numbers in its presentation today. Instead it spent much of the presentation trying to blame PRMI for having the temerity just to defend itself. But, Your Honor, I think all the numbers that I have gone through show that this wasn't a case about plaintiff responding to an overly-aggressive defendant. This was a case about plaintiff choosing to litigate a Rolls Royce prosecution by overstaffing every step along the way.

Your Honor, we didn't force plaintiff to do any of

that. We didn't force it to overstaff. We didn't force them to employ two firms full time. We didn't force them to send 10 timekeepers or more to every hearing; 12 timekeepers on average to every trial day. Those are their choices for which they have to bear the cost now because they can't shift those fees as reasonable.

We also didn't force them to bill more than 5.66 million long past the amount at issue by July 2019, showing that they never really made any serious effort to calibrate their spending to the amount at issue in this case.

Furthermore, the fact that PRMI raised certain defenses doesn't somehow absolve plaintiff of the responsibility to prove that its fees are reasonable. Defenses are raised in every case. They are always raised in commercial contract cases that get litigated. There's nothing unusual about that. And in this case they haven't shown that any of these defenses that they complain about were major drivers of their fees as opposed to the overstaffing which I've gone through.

Now, first of all, they complain about having to relitigate issues from Wave One. But, Your Honor, PRMI wasn't the defendant in Wave One. It wasn't bound by those rulings. We, as its lawyers, had a duty to defend it. But setting all that aside, you know, we took an efficient approach in this case by saying that plaintiff could

incorporate prior briefing where not appropriate, and that's exactly what plaintiff did time after time after time, so it's hard to understand why they billed so much.

Also, you know, Mr. Nesser talked about disproportionality in terms of the amount of fact depositions or the amount of re-underwriting. But, Your Honor, as we talked about, there were only 13, I believe -- I may have that wrong -- 14 total depositions, fact depositions, in the entire case, which is less than the standard rule. And as to re-underwriting, we only challenged 28 loans in our expert report at the loan-level and only 12 at trial. So this is hardly a case of us forcing them to litigate some -- to litigating in this Rolls Royce fashion.

Now, the issues that Mr. Nesser pointed to, you know, none of them really incredibly account for a large percentage of their fees. He pointed to the additional settling trusts issue. That was an issue involving a discrete set of bankruptcy documents. It was raised relatively late in the case. It doesn't explain any of their massive billing in the earlier case. They didn't respond to it with any new expert analysis or anything. They just address it in written briefs which were ten pages in total at summary judgment, less than --

THE COURT: Mr. Nicholson, would you just un-share

your screen?

MR. NICHOLSON: Oh, I'm sorry. I apologize. I didn't realize I still had that up.

THE COURT: Okay. Very good. Thank you.

MR. NICHOLSON: My apologies. Still kind of new to Zoom hearings.

So they address that issue in ten pages of all of their summary judgment briefs, less than three pages of *Daubert* briefs, and one sentence in the motion in limine. The Court excluded the issue entirely from trial and it came up only once at a sidebar after plaintiff arguably opened the door to that evidence. So plaintiff can't credibly claim that that's somehow a massive driver of its over $10 million in fees.

They also point to the Ally issue, which they addressed in all of two pages in their summary judgment opposition, two sentences in the motion in limine, and three paragraphs of a letter. And then they complained about a number of issues which they say were worth less than the associated fees, but they nowhere identify the amount of money that they spent litigating any of these issues or the amount of hours. And to the extent the amount of fees exceeded the amount at-issue here, it was probably due to the fact that plaintiff responded by overstaffing the case and over-litigating these issues.

Consider the monoline allocation. First of all, plaintiff itself injected this issue into the case by not sampling from all the monoline settlements in Wave One, and then taking the aggressive and unprecedented position that it could blend monoline rates across monoline settlements. Now, whatever one's view of the merits of that argument were, and I know the Court allowed them to do that, it certainly wasn't a position that had support in the case law. It was a very novel position. And they accused us of monoline damages of over $400,000, so it was hardly unreasonable for us to point this problem out. And indeed it had been pointed out in the *HLC* case and it was probably a major driver in the reduction of damages there.

You know, they complain that they had to respond to it by having Dr. Snow do this alternative monoline analysis, but they didn't re-underwrite any additional loans at that point. Instead, he just shifted his calculations and re-ran the numbers in a different way based on the same underlying loans.

And on top of that, I fail to see why their counsel would have spent a tremendous amount of time on that. It was an issue that was handled by Dr. Snow. And their counsel spent, I believe, the total testimony on this issue by McCrary and Snow accounted for only 3.5 percent of the trial by plaintiff's own math.

Now, they also point to, you know, the Countrywide pool. That's one they harp on. Well, first of all, you know, we don't agree that this was a $30,000 issue. The plaintiff, despite making that assertion, has never shown why it was $30,000 to begin with. The allegedly breaching loan in question had lost $61,000 and to be extrapolated across the at-issue population.

And furthermore, the issue had broader implications because it concerned whether an entire pool of loans originated for Countrywide were sold outside the Client Guide and thus could not be recovered upon because plaintiff was suing only under the Client Guide. That pool contained 12 at-issue loans and losses of over a million dollars. And if PRMI prevailed on this argument, then it had an argument at the damages phase. The experts were supposed to recalculate damages later. That plaintiff could not recover indemnity on any of those loans in that pool.

But in any event, this issue that plaintiff complains about hardly justified them spending a massive chunk of their hours, which they haven't even explained how much they spent on it. It accounted for one additional deposition that occurred during trial, and it accounted for just 2 percent of the trial transcript. So it's hard to see how this could be an explanation for why they billed so much.

Now, changing gears a little bit, plaintiff didn't really say a word today about its claim for costs, and I think that's notable because their claim for costs had some serious problems attached to it. They are seeking over $3.5 million in costs on top of all the attorney's fees that they are seeking. This includes costs for expert witnesses and fact witnesses.

Now, we think the Court should reduce this $3.5 million cost claim for several reasons. First of all, as part of this claim, plaintiff is charging PRMI $430,000 for expert work that was performed in Wave One. That is obviously improper. It's axiomatic that an attorney cannot bill in one case for work that he performed in another prior case. By the same token, an expert may not bill in one case for prior work he did in another case. Instead, an expert or an attorney can only bill for the incremental time that he spent updating that work for the new case.

So here, plaintiff's experts performed this $430,111 of work in connection with the Wave One cases to which PRMI was not a party, so plaintiff therefore may not charge PRMI's share of that work.

Now, tellingly, plaintiff's reply brief addressed this issue only in a footnote where they said, Well, if Dr. Snow hadn't been deposed in Wave One, then PRMI never would have agreed to a half-day deposition in this case.

But, Your Honor, that misses the point entirely. Attorneys and experts are expected to take advantage of their prior work product and to litigate in an efficient manner in the present case. And the fact that Dr. Snow had been deposed in a prior action doesn't somehow justify plaintiff in charging PRMI for that prior work in this case, nor does it justify charging PRMI with any of the $430,000 in Wave One expert costs.

On top of that, plaintiff is seeking $2.15 million in additional expert costs for this case for either Wave Two common work or case-specific work, and plaintiff hasn't shown that those costs are reasonable. It didn't even mention them today other than in passing, and an analysis of those costs shows that they are unreasonable.

For example, consider the period up to May 2019 when they issued their expert reports. Their opening reports. During that period, plaintiff spent over $746,000 in expert reports, expert costs, even though it was largely recycling narrative reports from Wave One using the same methodologies developed in Wave One.

You know, for example, Mr. Hawthorne made only minor revisions to his report, yet his law firm billed 88.37 hours and charged over $64,000 for those minor revisions.

As another example, Dr. Snow made only minor revisions to his opening report which consisted mainly of

deleting passages and then re-running his already determined formulas on PRMI's loans, and its firm charged $230,000 for that opening report and billed over 530 hours. Plaintiff provides no justification for any of this.

Now, consider the expert discovery period. During that period plaintiff spent another $721,000 in expert costs; and for much of that period, plaintiff's experts were just waiting on PRMI's experts to issue reports.

Furthermore, only three of their experts issued reply reports. Mr. Hawthorne's was virtually identical to his Wave One report. Dr. Snow's recycled work product from its prior Wave One supplemental report and only added these two new additional monoline issues which plaintiff says wasn't a big deal, and yet plaintiff still racked up over $700,000 in expert costs during this period.

Now, take Mr. Hawthorne, for example. He billed -- his firm, Axinn, billed over $239,000 and 280 hours, including 87 hours by Mr. Hawthorne at $1,150 per hour, and in was to issue a largely recycled supplemental report. On top of that, you know, they point to the fact that there was a deposition scheduled for him, but it was a deposition that was canceled a week in advance. That hardly explains these massive hours.

And then they also say he had to review Mr. Woll's report, which was only 36 double-spaced pages, and that

Mr. Hawthorne did not even issue a reply report to it. So 280 hours over this period seems unreasonable to me. Again, you don't have to be a green-eyeshade accountant to see that.

Now, Dr. Snow over this period where he issued this supplemental report with only two new analyses, billed -- his firm billed $385,000 and over 810 hours. So plaintiff likes to talk about how little the monoline issue was, yet its own expert billed $385,000 to put together his supplemental report.

And then consider the trial period. During this period plaintiff spent over $682,000 in expert costs, despite the fact that only three of its experts testified at trial. All three of those experts had actually testified at the *HLC* trial, and Butler testified only on the Global sample, but two of the experts, Dr. Snow and Mr. Hawthorne, had already testified on similar issues; yet Mr. Hawthorne's firm charged $276,00 and billed 260 hours for his trial preparation. This included 140 hours by Mr. Hawthorne at $1,210 per hour. Dr. Snow's firm charged $315,000 and billed over 460 hours for trial prep, including 128 hours by Dr. Snow himself who had already testified many times.

So given that these experts had already had experience testifying, it's unclear why it was necessary to bill these massive amounts of hours preparing for trial,

especially in a case involving just $5.4 million in damages.

Now, lastly, Your Honor, I would like to briefly touch on the issue of pre-judgment interest which plaintiff didn't address and I think there's a good reason for that. Plaintiff is asserting in this case for the first time that it's entitled to interest of 10 percent under Minnesota law running from the date the Court issued its post-trial ruling on August 14th, 2020, through the date the Court entered judgment on August 17th, 2020, until the future date when the Court enters a, quote, unquote, final judgment.

Now, in so arguing, they invoke the Minnesota interest statute which uses the words "final judgment" but that argument fails because these -- this issue is an issue of federal law, not Minnesota law. State law governs pre-judgment interest in a diversity suit, but the Eighth Circuit has held that federal law governs the award of post-judgment interest. In this respect, the federal post-judgment interest statute says it applies to, "any judgment in a civil case recovered in a district court."

Notably, that statute doesn't use the words "final judgment." It's not limited to final judgments. It applies to, quote, any judgment.

And Rule 58, by reference, discusses when judgment gets entered and says it's entered when there's a separate document put on the docket. Here the Court entered judgment

through the clerk's office pursuant to Rule 58 on August 17th, 2020, so plaintiff isn't entitled to state law interest at 10 percent after that date. Instead, any post-judgment interest is governed by the federal floating rate, which is just 0.13 percent.

Now, plaintiff's only real response to this is to argue that the judgment isn't really final because the Court still has to determine the pre-judgment interest. But plaintiff cites cases addressing whether judgments count as final decisions for purposes of appeal under 28 U.S.C. 1291. Those cases are inapposite here because Section 1961 applies to any judgment, not just final ones.

Further, the purposes in 1291 that plaintiff relies on and 1961 are very different. 1291 is about resolving every possible issue before the case goes up on appeal to avoid piecemeal appeals, but Section 1961 is about compensating the plaintiff for the loss of monies that are due as damages once the amount of damages has been determined. Here the Court has determined the amount of damages and entered judgment on August 17th, 2020. Accordingly, the federal post-judgment interest statute applies from that date forward.

Now finally, it's worth noting that plaintiff itself filed a proposed order saying it was entitled to state law interest only through "the judgment date of August

17, 2020," but then changed course and filed a corrected order asserting it was entitled to state law interest through date of the final judgment. Your Honor, we think plaintiff had it right the first time. Any interest after the judgment date of August 17th is a question of federal law, not state law.

If the Court has no questions, I'll rest.

THE COURT: Thank you, Mr. Nicholson.

Mr. Nesser, Ms. Christensen?

MR. NESSER: Yes, Your Honor, I will be responding and I'll try to keep it to a handful of targeted issues.

Your Honor, first, it's just difficult in a sense to imagine a better illustration of the issues that I was talking about this morning than what we just listened to. We had 95 minutes of argument. We had slides that I couldn't even read without squinting because of all of the detail. We've gone back and forth about green-eyeshades and all the rest, but it's like I almost literally needed some kind of an eye shade just to read those charts, and that's just not what this is supposed to be. That's what the Supreme Court has held and that's what this Court has held. And this, you know, hour-and-a-half-long travel through every single event in the history of the litigation and every single time entry is just inherently not appropriate.

Mr. Nicholson started, it was a while ago, but

started by saying that -- talking about how there was a standard amount of standard litigation activities that were routine litigation activities, that there was nothing unusual here. Again, I just think that what we just lived through is precisely the nonstandard, nonroutine, unusual, expensive, extraordinary process that we have lived through for the last several years.

Your Honor, second, on the issue of Mr. Nicholson's comments about Mr. Cambronne's declaration, our expert. Mr. Nicholson said he could not think of a more damning indictment than our expert's failure to opine on reasonableness.

Your Honor, I'm just a little speechless. Mr. Cambronne was not retained to offer opinions on reasonableness. He was retained to rebut Mr. Remele's report. And because Mr. Remele had no opinion on reasonableness, neither could Mr. Cambronne. The whole point of Mr. Cambronne's declaration is that it's not appropriate for an expert and not feasible for an expert in this case to opine on reasonableness because Your Honor is the expert having lived through this and supervised it closely.

Next, Your Honor, Mr. Nicholson mentioned this a couple of times, this point that -- not in the brief but he says that we spent $5 million prior to July 2019 and he says

how can plaintiffs possibly have done that, and that was before any of the issues that they complained about.

Your Honor, if you'd look back at the exhibit we went through before with all the examples of when we raised the issue of proportionality, we complained eight different times, eight, prior to July 2019 about the manner in which they were litigating this case. Eight times. And so these arguments about $5 million before 2019, that's exactly our point, Your Honor.

You know, the Court, Your Honor in the *HLC* decision and also -- also Your Honor in the *Ewald* decision, the Court's *Ewald* decision, cited Judge Easterbrook's decision in the *Cuff* case, and there was a long quote from that case in the Court's decision, in Your Honor's decision, so I won't belabor it. But I think -- I think Judge Easterbrook's assessment there of what it is in the real world to litigate under circumstances like this is perceptive and true. We spent amounts that we thought were appropriate to spend and then we had to deal with additional issues that went far beyond what we thought was appropriate to spend.

And at that point in time the Trust had two decisions to make. Either it could drop the claim because it was going to cost a lot of money to litigate, or spend the money to continue prosecuting the claim, even though it

would cost some amount of additional money.

The first of those options is just not fair. It's not consistent with the law. It's not consistent with the contract. It's not consistent with the Trust's fiduciary duties. And so we spent the money that we needed to spend to address the issues that were arising as they arose, even where it costs more than we would have preferred to spend. But it would have been unfair and ultimately irrational for us to have behaved differently, and those are the words that Judge Easterbrook uses.

Your Honor, next on the issue of proportionality, I just wanted to note this briefly. Mr. Nicholson compared the fee request here to our -- to the verdict, to damages plus fees and interest, and that's not the correct comparison. Your Honor addressed this issue in the *HLC* fee decision at page 852 of the Westlaw version. What Your Honor held there is that the comparison is fees against the damages, plus pre-judgment interest. And that comparison is about $10 million in fees relative to $7 and a half million of damages and pre-judgment interest.

And so, you know, again, the numbers are what they are. I just think that Mr. Nicholson was overstating significantly the delta between the -- the relationship between those two numbers.

Your Honor, on the issue of just kind of taking a

step back, you know, on the issue of whether our $10 million or so fee request here is reasonable, I want to underline what Ms. Christenson mentioned this morning about what it costs to litigate this case versus -- what was involved in litigating this case versus what was involved in litigating *HLC*. It was the same 150-loan sample. It was the same indemnity claim. It was the same bankruptcy. It was the same, right? I mean, there was no less work required here than was required there.

The issues were different and we had to reinvent, we had to address distinctions and all kinds of other issues, but the scope of the case was no narrower here than it was in *HLC*. The cases in terms of scope are the same. The only difference happens to be the happenstance of how much money that 150-loan sample extrapolated to. It happened to extrapolate to $5 million here. It happened to extrapolate to a larger number at PRMI, but the scope was the same.

And if it was reasonable, as Your Honor held, to have spent -- to have an $18 million fee award in *HLC* to litigate a case of that scope, it's equally reasonable, it's more reasonable to litigate, to have spent $10 million in fees here. The scope of the case was the same. The fee request is almost half, almost 50 percent less.

So that's the comparator. If we're looking for a

comparator, that's the comparator. This case ought to be compared to *HLC* which was the same scope but on which we spent almost twice as much money.

Your Honor, I guess just in closing, it's not an exaggeration to say that working on this case with this team and with the Court was the honor of my career. You know, we were talking over the break and, you know, getting maybe a little emotional about it; and I don't want to go too far but I can't imagine a group that I've ever been prouder of or that I ever would be prouder of. I can't imagine the work that we would have been prouder of. We think we did great work together and we think that the Trust ought to be compensated appropriately for that.

Your Honor, I hope -- it's a funny thing to say -- I hope this will be the last time we're before the Court in these cases. I hope it's not the last time we're before Your Honor in other cases, but we really do appreciate having spent all these years with Her Honor and it was a privilege to appear before you and to learn from the Court, and we thank you very much.

THE COURT: Well, thank you, Mr. Nesser.

And thank you, Mr. Nicholson and Mr. Johnson.

It was a privilege to preside over this case for seven years, these cases for seven years, and it was an extraordinary opportunity for me and I will always look back

on it very fondly, and the work on both sides in these cases was outstanding. Outstanding work, highest level work. Two very interesting trials. Perhaps the first pandemic order about witnesses in a trial in the country, so it was a wonderful experience for me as well.

The Court will study this, of course, and take it under advisement, and I wish everybody a happy holiday but, most importantly, a healthy new year.

Court is adjourned.

MR. NESSER: Thank you, Your Honor.

MS. CHRISTENSON: Thank you, Your Honor.

MS. NELSON: Thank you, Your Honor.

(Court adjourned at 11:42 p.m.)

* * *

I, Carla R. Bebault, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: s/Carla R. Bebault
Carla Bebault, RMR, CRR, FCRR